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Wednesday, November 07, 2007

Letters lash out at wrong villai

The judge who leaked Schwall's e-mail is the one who broke public trust

By Cary Ichter, Special To The Daily Report

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I HAVE READ AND heard the various reactions to Judge Craig L. Schwall's recent comments regarding Judge Hilton Fuller's handling of the Brian Nichols case. My first suggestion to everyone would be as follows: Take a breath and consider what is being discussed. The discussion concerns a judge who shared his views and concerns with his judicial colleagues in a private e-mail. Judges are adults who ought to be allowed to communicate freely amongst themselves on issues of importance to the bench. They ought to be able to communicate privately in ways that reflect the depth of their convictions and the strength of their passion. And they ought to be able to do so without one of their number turning private dialogue into public debate.

Like many other lawyers, I am deeply concerned with the preservation of the independence of the judiciary. Generally, any discussion on that topic implicates the other side of the coin: accountability. We understand that an independent judiciary can only survive if it is also accountable. Those who would strip the courts of their authority have no greater ally than judges who act without judgment and without accountability.

We also know that the public interest groups can only comment on the performance of judges at the risk of being accused of trying to buy seats on the bench. We know the Legislature cannot control, attempt to control or even comment on the activities of the judiciary without being accused of running afoul of notions of separation of powers. And now we learn that even other judges cannot comment on the performance and activities of their peers without being scolded and ridiculed. I am left to wonder: If a judge cannot comment to judicial colleagues on the questionable performance of another judge, to whom are judges answerable?

We are told in the letters published in the Nov. 5, 2007, Daily Report ["Judge Schwall unfairly attacked Judge Fuller"] that Judge Schwall's comments regarding Judge Fuller have eroded public trust in the judiciary. To those who make this suggestion, I have a proposal. We will hire a pollster to ask the following question to a random sample of the public: Who do you worry more about, (1) a judge who allows a multiple-murder defendant who plainly committed the crime to be represented by four lawyers charging the state millions of dollars to present a mental health defense when the vast majority of criminal defendants in the state (some of whom actually are innocent) present their defenses with a single lawyer and for a mere fraction of the cost or (2) the judge who says the first judge is "a fool?" While one might quibble with the language employed by the second judge, I have no doubt as to what the poll results would show.

For those so offended by Judge Schwall's comments, I direct you to any handy dictionary. My Webster's defines "fool" as "a person lacking in judgment or prudence." I submit that many would endorse this as an apt description of Judge Fuller's handling of the Nichols case. (Of course, we cannot speak these words aloud lest we be accused of attacking the judiciary.) If there is insanity involved in the Nichols case, one need look no further than the amount paid to defense counsel to find it.

Perhaps the most striking aspect of the criticism heaped upon Judge Schwall is that no one is asking the question that struck me first: Who on the Fulton County bench leaked this e-mail to the press? Judge Schwall's e-mail was written to colleagues on the bench. Far from being a public assault on Judge Fuller's reputation or "pandering" intended to ingratiate Judge Schwall among any particular group, this was a private communication to and among the members of the Fulton County Superior Court bench. It was sent in confidence with the implicit understanding that these judges could share their professional views concerning an important and timely issue without reading about it in the paper the next day. These are the same kinds of communications that partners within law firms, for example, have on a regular basis. We send them believing and understanding that the communication is private. These are communications that are initiated in reliance upon the discretion of fellow judges.

That trust was broken—for what reason we do not know. But if there is a villain to be found in the sideshow to a larger tragedy, it is the person who leaked this e-mail to the media. That villain betrayed the trust of another judge and hurt two judges along the way. If anyone eroded public trust in the courts, it is that villain. How can the public trust a judge who cannot even be trusted by other judges?

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